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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-115

NORMAN H. EGENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Norman H. Egenberg prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 26, 1971 in this proceeding.

Opinion Below

The opinion of the Court of Appeals, reprinted in the Appendix hereto, is reported at 441 F. 2d 441. No opinion

was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on March 26, 1971. A timely petition for rehearing *en banc* was denied on May 24, 1971, but the application to continue petitioner on bail pending this application was granted. On June 15, 1971, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including July 23, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether, in a prosecution for the willful making or causing to be made of a false, fictitious and fraudulent statement and representation in a United States Departing Alien Income tax return (Form 1040C) in violation of 18 U. S. C. §1001, a jury verdict of guilt must be set aside where

> (a) the jury was charged that the wilfulness necessary to a violation of this section can be found if the prosecution's proof shows that petitioner acted "with reckless disregard of whether the statement on the [tax returns] was true, or if he acted with a conscious purpose to avoid learning the truth, . . ." and
>
> (b) the jury was not thereby advised that the critical element of wilfulness under Section 1001 was knowledge of the falsity of the statement on the return.

2. Whether the principles and rationale of *Ex parte Bain,* 121 U. S. 1, 7 S. Ct. 781 (1887); *Stirone* v. *United States,* 361 U. S. 212, 218-219, 80 S. Ct. 270, 274 (1960) and *Russell* v. *United States,* 369 U. S. 749, 770-771, 82 S. Ct. 1038, 1050 (1962) require the acquittal of petitioner where, notwithstanding the failure of the proof that petitioner aided and abetted violations of 18 U. S. C. §1001, the trial court upon the request of the prosecution submitted the case to the jury by deleting the aiding and abetting charge and substituting therefor a new issue whether or not petitioner alone had directly committed the offenses.

3. Did the order of the District Court compelling petitioner, over objection, to submit handwriting exemplars to the grand jury after his first indictment which were used as evidence against the petitioner at his trial constitute a violation of his Fourth Amendment prohibition against unreasonable searches and seizures?

4. Can the verdict against appellant on the gratuity* counts under 18 U. S. C. §201(f) stand where the jury was advised that they could not consider acts of solicitation and economic coercion by agents of the Internal Revenue Service as evidence in behalf of petitioner on these counts but only on the counts charging bribery under 18 U. S. C. §201(b) where the jury acquitted appellants of all such bribery counts.

5. Can a conviction on Count 62 stand for making a false statement in a return in violation of Title 18 U. S. C. §1001 on which petitioner received five years in jail and a fine of $10,000.00 in view of the enactment of Title 26

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* This is a convenient nomenclature used by the Second Circuit although hardly fitting for a felony with a two year maximum.

U. S. C. §7207 in 1954 providing that the identical but specific offense shall constitute a misdemeanor with a maximum term of one year in jail and a fine of not more than $1,000.00?

Statutory Provisions Involved

Title 18, United States Code, §1001:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statement or representations . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, §2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Title 26, United States Code, §7206(2):

> "Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return . . .;"

Title 26, United States Code, §7207:

> "Any person who willfully delivers or discloses to the Secretary or his delegate any . . . return

> . . ., known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

Title 18, United States Code, §201(b):

> "(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official, to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act;"

Title 18, United States Code, §201(f):

> "(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;"

Statement of the Case

Petitioner was first indicted in 1968. This was superseded January 12, 1970 in an indictment consisting of 88 counts on which he was tried below.

1. Counts 1-28 charged petitioner with bribing Internal Revenue agents to influence their decisions with respect to the audit and issuance of alien travelling permits on

Departing Alien Income tax returns (Form 1040C) and year-end returns (Form 1040B).

2. Counts 29-56 were the same facts as Counts 1-28 except that they were brought under 18 U. S. C. §201(f) and the payments and the giving of things of value were for and because of the same audits and alien travelling permits referred to in Counts 1-28.

3. Counts 56-71 charged petitioner with aiding and abetting the wilful making of false, fictitious and fraudulent statements and representations on the United States Departing Alien Income tax returns (Form 1040C) of certain named alien taxpayers, in violation of 18 U. S. C. §1001, and 18 U. S. C. §2, in that the tax returns indicated it was the intention of such taxpayers not to return to the United States when petitioner "in truth and in fact", "well knew" they intended to return to the United States.

4. Count 72 also charged petitioner with aiding and abetting the wilful making of a false, fictitious and fraudulent statement and representation on the United States Departing Income Tax return (Form 1040C) of members of the touring company of Ballet Folklorico de Mexico, in violation of 18 U. S. C. §1001 and 18 U. S. C. §2, in that the gross income of the ballet company and its members was reported as $130,717.50, whereas petitioner in truth and in fact well knew it was $277,399.72.

5. Counts 73-84 charged petitioner with aiding and abetting the wilful preparation and presentation of false and fraudulent material matters contained in United States Departing Alien Income tax returns of named alien taxpayers, in violation of 26 U. S. C. §7206(2) and 18 U. S. C. §2, in that various deductions were claimed on

those returns whereas petitioner in truth and in fact well knew they were not so entitled.

6. Counts 85-88 likewise charged petitioner with aiding and abetting the wilful preparation and presentation of false and fraudulent material matters contained in United States Departing Alien Income tax returns (Form 1040C) of named alien taxpayers, in violation of 26 U. S. C. §7206(2) and 18 U. S. C. §2, who were the same taxpayers set forth in Counts 57-71 and 72 charging petitioner with aiding and abetting the wilful making of a false statement in the United States Departing Alien Income tax returns, in violation of 18 U. S. C. §1001 and 18 U. S. C. §2.

Following a three and a half week trial, the jury on June 25, 1970 returned a verdict of not guilty on the counts described in "1"; a verdict of guilty on 22 of the counts described in "2", not guilty on five and one of which had been withdrawn by the prosecution at the close of its case; a verdict of not guilty on six counts described in "3" and guilty on Count 62, one count, 58, having been withdrawn by the prosecution at the close of its case; the prosecution withdrew the count described in "4"; a verdict of not guilty on four counts described in "5"; a verdict of guilty on two counts, 77 and 81, six other counts having been withdrawn by the prosecution at the close of its case; the prosecution, also, withdrew the counts described in "6" at the close of its case.

Upon petitioner's finding of guilt on the counts described in "1", he was sentenced to the maximum term of two years imprisonment and fined $100.00 on each of the counts; on the finding of guilt on Count 62 involving the issues charged in "3", he was sentenced to the maximum term of five years imprisonment and fined $10,000.00; on

the finding of guilt on Counts 77 and 81 described in "5", he was sentenced to the maximum term of three years imprisonment and fined $2,000.00. The prison sentences were made to run concurrently with each other, whereas the fines were aggregated totalling $16,200.00. Motions for judgment of acquittal and for a new trial were denied. On appeal, the Second Circuit affirmed the conviction.

The relevant facts underlying this conviction may be briefly stated. Petitioner is 46 years of age, has been married 21 years, has three children. He became a certified public accountant in New Jersey 16 years ago and was thereafter licensed in New York. He has no prior criminal record. His interest in the opera led to his representation of alien opera singers, alien orchestra conductors, and other alien artists. His accounting and professional experience involved the preparation and presentation of United States Departing Alien Income tax returns (1040C) and final returns (1040B). The 1040C was a sailing permit issued by Internal Revenue Service which an alien was required to have in order to leave the country. The form reflected any tax due and owing for the period less than a year that the alien was here based upon income and expense and withholding from income and any refund to which the alien may be entitled. All of these aliens were well-known professional artists. All were in the United States for a specific performance. They were thus on a travel status and were entitled to all of the expenses incurred such as travel, hotels, meals, commissions, etc. Petitioner had no written contract for his services with these artists. His understanding with them was oral and was simply to prepare their sailing permits upon information submitted to him without any audit or certification on his part as to the accuracy of the

material placed by him on the 1040C or the final return 1040B. So far as petitioner knew, there was no reason to doubt or disbelieve the material submitted to him. His work with these artists was at any and all hours. It was frequently necessary to meet them in their hotels and apartments. Because it was impossible to arouse some of these artists early enough to have them visit the Internal Revenue Service, petitioner obtained powers of attorney in accordance with Treasury regulations. In almost all of the tax returns involved in these charges, the information placed on the return came directly from the alien or the alien's wife. In only two instances involving the tax returns of Sixten Ehrling and Jon Vickers was the information supplied to petitioner by their agents. Ehrling, for example, had never met petitioner. Thus, Columbia Artists supplied the information on Ehrling and William Stein Agency on Jon Vickers. Subsequent to petitioner's first indictment in 1968, and on or about December 12, 1969, prior to the superseding indictment, petitioner was ordered by the District Court on the application of the United States of America, over objection by petitioner, to submit handwriting exemplars. These exemplars were utilized by a handwriting expert for the prosecution to indicate that by a comparison of the exemplars and some writing which appeared on some records of Columbia Artists Management, Inc., the agent for Ehrling, petitioner's handwriting appeared on those records in the files of Columbia Artists Management, Inc. Since Ehrling testified that it was his intention to return to the United States when his 1040C form was submitted, petitioner's conviction on Count 62 for submitting a false statement on the return in violation of 18 U. S. C. §1001 turned on the trial court's charge as to what petitioner's duty was in the preparation of that return. This was also true with Ehrling's and Vickers' tax returns under Counts 77 and

81 on which petitioner was found guilty of submitting tax returns containing false material matter in violation of 26 U. S. C. §7206(2) and 18 U. S. C. §2. This charge permitted wilfulness to be found on 18 U. S. C. §1001 if the jury was satisfied that petitioner had acted recklessly or with a conscious purpose to avoid the truth. The spill-over to the counts under 26 U. S. C. §7206(2) was obvious.

In 1965, the period referred to in the indictment, petitioner submitted to and obtained from various tax technicians approval of numerous forms 1040C. Two tax technicians who testified for the prosecution and to whom the petitioner submitted such forms for approval denied ever receiving or soliciting any things of value from him. Three others, Fontana, Gordon and Pacello, testified they were paid by and received gifts from petitioner. These were admittedly corrupt agents who solicited payments and gifts from tax practitioners such as petitioner. Petitioner testified that Gordon "dictated or set down standards and stated bluntly that regardless of whether they did anything or not, it is customary that you give the boys." It didn't matter, said petitioner, whether you had given to more than one agent or the same agent, "You had to take care of every one of them." If he didn't pay them, said petitioner, they threatened to disallow arbitrarily all the deductions on the alien tax returns, and to delay him in obtaining the required sailing permits. The trial court charged the jury they could consider petitioner's evidence of solicitation and economic coercion on the part of the agents on petitioner's intent to influence the agents' official action in Counts 1-28 involving the charge of bribery. But in conformity with an earlier decision of the Second Circuit Court of Appeals in *United States* v. *Barash*, 365 F. 2d 395 (1966), the jury was instructed they could not consider such evidence on Counts 29-56. The jury acquitted petitioner on all the bribery counts but convicted him on 22 of the gratuity counts.

In affirming the conviction, the Second Circuit made the following determinations:

1. With respect to the charge of falsely stating on Ehrling's return of April 17, 1965 that Ehrling did not intend to return to the United States (Count 62), the jury need only find that the petitioner acted "with reckless disregard of whether the statement was true" or "acted with a conscious purpose to avoid learning the truth."

2. The trial court was correct in withdrawing the aiding and abetting charge on the Title 18, U. S. C. §1001 counts because "at no time during the trial was any evidence presented on an aiding or abetting theory, the theory at all times being that none of the taxpayers knew of [petitioner's] fraud."

Reasons for Granting the Writ

1. The decision below approves a standard of wilfulness under 18 U.S.C. §1001 that is in conflict with that established by this Court and followed by other Circuits.

The Second Circuit approved the trial judge's charge to the jury that the wilfulness essential to a conviction under Title 18 U. S. C. §1001 for wilfully making or causing to be made a false, fictitious and fraudulent statement or representation in a tax return could be found if the jury determined petitioner acted with reckless disregard of whether the statement was true or acted with a conscious purpose to avoid learning the truth. This standard is directly contradicted by the applicable decisions of this Court and of other Circuits.

Without question, the conviction on Counts 62, 77 and 81 on the tax returns of Ehrling and Vickers must be traced to this charge since it is with respect to these two

taxpayers that the information for the preparation of the tax returns came from their agents, unlike the other aliens on whose returns petitioner was acquitted.

In *Bryson* v. *United States*, 396 U. S. 64, 72, 90 S. Ct. 355, 360 (1969), this Court said with respect to the elements under Title 18 U. S. C. §1001:

> "A citizen may decline to answer the question or answer it honestly, but he cannot with impunity knowingly and wilfully answer with a falsehood."

Previously, in dealing with a claim that the predecessor of Section 1001 was invalid as vague and indefinite in that people were not aware of what conduct was proscribed by it, the Supreme Court, in *United States* v. *Gilliland*, 312 U. S. 86, 91, 61 S. Ct. 518, 521 (1941), rejected the claim stating that the statute gives "notice of the consequence of knowingly and wilfully including therein any false and fraudulent statements." The existence of this requirement of wilfulness was similarly accepted as a reason for rejecting a claim of unconstitutional vagueness in *United States* v. *Houcks*, 224 F. Supp. 778 (D. C. Mo. 1963). The District Court noted that as long as the Government must prove wilfulness under its standard concepts, the act does not permit punishment without warning of offenses of which the accused may be unaware, citing *Screws* v. *United States*, 325 U. S. 91, 65 S. Ct. 1037.

Other Circuits have likewise required under Section 1001 that the forbidden act be done deliberately and with knowledge. *United States* v. *Markee*, 425 F. 2d 1043, 1046 (9th Cir. 1970); *Neely* v. *United States*, 300 F. 2d 67, 72 (9th Cir. 1962); *Corcoran* v. *United States*, 229 F. 2d 295, 299 (5th Cir. 1956); cf. *Jacobs* v. *United States*, 359 F. 2d 960, 966 (8th Cir. 1966), where under a similar

statute outlawing false statements to a Government agency, then Circuit Justice Blackmun said:

> "But carelessness or lack of wisdom is not equivalent to the knowledge of falsity required by the statute."

It is inconceivable that Congress intended a five year maximum term of imprisonment, which is what petitioner received, should result from a reckless statement in a tax return easily confused with gross negligence or carelessness, but that under Title 26 U. S. C. §7206(1) or (2) or Title 26 U. S. C. §7207 which are the felony and misdemeanor counterparts in the Internal Revenue Code of Title 18 U. S. C. §1001 dealing with false statements in a tax return a specific intent or knowledge would be required. Cf., e.g., this Court's opinion in *Sansone* v. *United States,* 380 U. S. 343, 350, 85 S. Ct. 1004, 1009 (1965). To permit this conviction to stand would provide the Government with a gimmick enabling it to by-pass the Internal Revenue Code relating to wilful false statements in a tax return and to bring such prosecutions in the Second Circuit under Title 18 U. S. C. §1001 in order to prove wilfulness on a vague and undefined concept of reckless conduct.

2. The Second Circuit in upholding the action of the trial court in deleting the charge of aiding and abetting in Counts 56-71 (including Count 62 on which petitioner was convicted) permitted an amendment of the indictment which the District Court was powerless to accomplish.

Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781 (1887);
Stirone v. *United States,* 361 U. S. 212, 218-219, 80 S. Ct. 270, 274 (1960);
Russell v. *United States,* 369 U. S. 749, 770-771, 82 S. Ct. 1038, 1050 (1962).

In so doing, as a practical matter the petitioner was severely prejudiced in his defense to the aiding and abetting charge. The defense had concentrated on the fact that the aliens were made aware by petitioner that there could be no refund if they intended to return to the United States and yet they did not so advise the petitioner. It was, therefore, prejudicial for the court to in effect direct the jury to find that there did not exist "any basis in this case for finding that any particular alien actually intended to make a false statement." In substance, this was a further direction to the jury that they could disbelieve the petitioner's testimony.

The corrected charge, therefore, not only withdrew the aiding and abetting portion which, it is submitted, was improper, but it buried the petitioner insofar as the defense relied upon the credibility of his testimony as to his conversations with the alien artists as to their intention to return to the United States.

3. The Trial Court's order to petitioner to submit handwriting exemplars constituted a violation of his Fourth Amendment prohibition against unreasonable searches and seizures.

The Second Circuit indicated that the United States proved petitioner had examined Ehrling's file at Columbia Artists Management, Inc. and that this file contained several contracts obligating Ehrling to return to the United States before the end of 1965. It was because of this inferred fact under the charge of the Court that wilfulness could be found if petitioner acted recklessly, that the jury could have determined petitioner should have known. The inference that petitioner examined the file was based on some handwriting on one typed statement in the Colum-

bia file which a handwriting expert said was written by the same hand that wrote the exemplars.

The Second Circuit has interpreted an order directing a defendant to submit handwriting exemplars as under no Fifth Amendment limitations in view of this Court's opinion in *Gilbert* v. *California*, 388 U. S. 263, 87 S. Ct. 1951 (1967). However, the Seventh Circuit Court of Appeals and one District Court in the Northern District of Illinois has recently held that such "compulsory submission constitutes a seizure subject to the Fourth Amendment's prohibtion against unreasonable searches and seizures." *Hill* v. *Philpott*, C. A. 7, —— F. 2d ——, 9 Cr. L. 2023; *United States* v. *Bailey*, —— F. Supp. —— (D. C. N. D. Ill. 1971); cf. *In re Dionisio*, 442 F. 2d 276 (7th Cir. 1971). These decisions indicate that an order to provide handwriting exemplars must be justified whether the standard be probable cause or overall "reasonableness." They also make clear that a finding of probable cause does not exist merely because an indictment has been returned, but rather that there must be a further showing of probable cause to justify a specific search or seizure. No such showing was made in this case.

4. Can the verdict of guilt on the counts under Title 26 U.S.C. §201(f) stand when the defense of solicitation and economic coercion was taken from the jury on these counts although allowed on the bribery counts under Section 201(b)?

The charge of the trial court excluding the defense of solicitation by the agents and economic coercion on petitioner was based upon the Second Circuit's opinion in *United States* v. *Barash*, 365 F. 2d 395 (1966).

It is respectfully submitted that the exclusion of this defense is contrary to this Court's previous opinions and others which have dealt with the subject.

In *Tomoya Kawakita* v. *United States,* 343 U. S. 717, 72 S. Ct. 950 (1952), this Court recognized that acts performed under economic or other duress would not be criminal:

> "Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere nonperformance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan. He may be coerced by his employer or supervisor or by the force of circumstances to do things which he has no desire or heart to do. That was one of petitioner's defenses in this case. Such acts—if done voluntarily and wilfully —might be treasonable. But if done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offense. The trial judge recognized the distinction in his charge when he instructed the jury to acquit petitioner if he did not do the acts willingly or voluntarily 'but so acted only because performance of the duties of his employment required him to do so or because of other coercion or compulsion.'" 343 U. S. at 735, 72 S. Ct. at 961.

Earlier in *Union Pac. R. Co.* v. *Public Service Commission of Missouri,* 248 U. S. 67, 70, 39 S. Ct. 24, 25 (1918), this Court, speaking through Mr. Justice Holmes, stated:

> "The Railroad Company and its officials were not bound to take the risk of these threats being verified. . . . It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." 248 U. S. at 70, 39 S. Ct. at 25.

Relying on that opinion, the New York Supreme Court in *Hornstein* v. *Paramount Pictures*, 37 N. Y. S. 2d 404, 413, 415 (Sp. T. N. Y. Co. 1942). unanimously affirmed 266 App. Div. 659, unanimously affirmed 292 N. Y. 468, 66 N. E. 2d 740, ruled:

> "Statutes sometimes make the doing of an act criminal without regard to the doer's intent or knowledge . . . but I think no statute ever attempted to make involuntary action a crime." 37 N. Y. S. 2d at 413.

> "Blackmail, extortion, and an infinite variety of forms of duress have been familiarities in the law for centuries, and while they doubtless would have been wiped out long ago if all citizens refused submission, I think no instance can be found—certainly none has been cited—in which submission has been made the basis of either criminal or civil liability. On the contrary, the law always has treated the submitter to illegal exaction as a victim rather than a wrongdoer and outrager of public policy. Usury, which clearly is contrary to the public policy of this state would not exist if no citizen submitted to the exactions of the usurer, but those who do submit certainly are not classed as violators of public

policy because they thereby encourage usury and make it possible." *Hornstein* v. *Paramount,* 37 N. Y. S. 2d at 415.

5. Judgment of acquittal should have been granted on Count 62 under Title 18 U.S.C. §1001 for the making of a false statement in the tax return of Sixten Ehrling or for aiding and abetting it in view of the Congressional adoption of Title 26 U.S.C. §7207 which preempted the jurisdiction for such an offense.

The prosecution of petitioner under the 1001 counts resulted in a conviction on Count 62 on which petitioner was given a maximum sentence and fine of five years and $10,000.00. For the same offense, 26 U. S. C. §7207 provides a maximum punishment of one year and/or a fine not more than $1,000.00.

Section 7207 requires the filing (willful) of a return known to be false or fraudulent in many material manner. "The elements are willfulness and the commission of the prohibited act." *Sansone* v. *United States,* 380 U. S. 343, 352, 85 S. Ct. 1004, 1010 (1965).

When the prohibited act is the filing of a tax return, it is clear that the conduct which falls under Section 1001 likewise falls under Section 7207. The choice made by the prosecution here brings to mind the dissenting opinion of Mr. Justice Douglas in *Berra* v. *United States,* 351 U. S. 131, 139, 76 S. Ct. 685 (1956), that:

> "This basic principle [of fairness] is flouted if either of these statutes can be selected as to the controlling law at the whim of the prosecuting attorney or the Attorney General. 'For the very idea that one man may be compelled to hold his life, or the means

> of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable . . .'"

Whatever may have been the concept of the applicability of Section 1001 to tax returns generally, the opinion in *Sansone* v. *United States, supra,* would seem to indicate that a change was intended by the Internal Revenue Code of 1954.

> "Congress specifically stated that it placed all these provisions [penalty provisions] in the same part of the Code because it wished them to apply to taxes generally, including income taxes." *Sansone* v. *United States,* 380 U. S. *supra* at 348, 85 S. Ct. *supra* at 1008-1009.

The Supreme Court in *Sansone* concluded that Section 7207 was a lesser included offense to a charge of attempting to evade a tax by filing a false return under 26 U. S. C. §7201. The use of §1001 as a vehicle for this offense is thus an unwarranted interference with the Congressional policy and it was also improper as an unconstitutionally broad discretion to proceed under either the misdemeanor or felony statutes.

CONCLUSION

For these various reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS BENDER,
Attorney for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 600—September Term, 1970.

(Argued January 22, 1971 Decided March 26, 1971.)

Docket No. 35447

UNITED STATES OF AMERICA,

Appellee,

—v.—

NORMAN H. EGENBERG,

Defendant-Appellant.

Before:

MEDINA, HAYS and ANDERSON,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* convicting appellant, Norman H. Egenberg, after a jury trial, on twenty-two counts for unlawful payment of gratuities in violation of 18 U.S.C. §201(f) (1964) and on three counts for filing false statements in

violation of 18 U.S.C. §1001 (1964) and 26 U.S.C. §7206(2) (1964).

Affirmed.

JAMES T. B. TRIPP, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Henry Putzell, III, Charles B. Updike, Assistant United States Attorneys, on the brief), *for Appellee.*

LOUIS BENDER, New York, N. Y., *for Appellant.*

HAYS, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York convicting appellant on twenty-two counts charging unlawful payment of gratuities in violation of 18 U.S.C. §201(f) (1964) and on three counts for filing false statements in violation of 18 U.S.C. §1001 (1964) and 26 U.S.C. §7206 (2) (1964). The court imposed a two-year sentence of imprisonment and a $100 fine for each of the twenty-two gratuity counts; a five-year sentence and a fine of $10,000 on the first of the false-statement counts; and a three-year sentence and a $2000 fine on each of the remaining false-statement counts. The prison sentences are to run concurrently.

We affirm the convictions.

Appellant Egenberg, a certified public accountant, represented a number of European musicians and singers before the Alien Tax Section of the Internal Revenue Service. Among the services he rendered was the preparation of Departing Alien Income Tax Returns (Form 1040C) as

well as the ordinary year-end returns (Form 1040B). By stating in connection with Form 1040C that he did not intend to return to the United States before the end of the year, an alien taxpayer could secure an immediate refund of any excess in taxes withheld.

In the returns he filed appellant grossly inflated his clients' deductions for such expenses as outlays for commissions, secretary-interpreters, coaching, publicity, voice training, accompanists, gratuities, copyright fees, as well as the expenses of travel, hotels, and meals when engaged for a specific performance. In order to assure that these returns would not be questioned Egenberg made payments to Vincent Fontana, Solomon Gordon and Raphael Pacello, Alien Tax Section technicians whose duty it was to examine the returns. In 1964 when a new policy required taxpayers to substantiate deductions, appellant began submitting as such substantiation forged or altered documents.

Appellant's unlawful activities were discovered when Vincent Fontana confessed in late 1964 that he had participated in widespread corruption in the Alien Tax Section. Fontana remained in his position by arrangement with the Inspection Service of the Internal Revenue Service and reported in a daily log evidence of graft that came to his attention. This cooperation led to the arrest of the appellant and tax technicians Gordon and Pacello in January 1966.

Fontana testified that during the period from January 1965 to January 1966 he examined at least thirty returns prepared and filed by the appellant and that appellant made ten cash payments to him during the same period. Fontana testified that he accepted deductions which he

knew were excessive and which were unsubstantiated and that he did not question appellant's representation that such Metropolitan Opera regulars as Tebaldi, Konya, Nilsson, Tucci, and Stratas did not intend to return to the United States later during the year 1965. Twenty of the thirty returns examined by Fontana showed a net loss.

Gordon testified that Egenberg paid him between $500 and $600 in six or seven payments during 1965 and that Egenberg had made similar payments every year since 1960. At least twenty returns submitted by Egenberg during 1965 were examined by Gordon.

In exchange for favorable treatment of the returns he had filed, appellant allowed Pacello to use his credit cards. During 1965 at least fifteen returns filed by Egenberg were examined by Pacello. About half of them showed net losses.

The return filed by appellant for Sixten Ehrling, permanent musical director of the Detroit Symphony Orchestra, showed gross income from January 1, to April 15, 1965 of $14,492.08 with expenses totalling $13,081.11. Ehrling testified that his commissions were 20 per cent of gross income, not the 30 per cent reported by appellant, that his publicity expenses were $10.61 not $1,575 and that he had no expenses for a secretary-interpreter or accompanist claimed by appellant to have been $575 and $340. Egenberg indicated in connection with filing Ehrling's Form 1040C that Ehrling did not intend to return to the United States after April 15, 1965, although Ehrling was at that time under obligation to conduct the Detroit Symphony Orchestra at special appearances during the summer and during its regular 1965-1966 season in the fall.

Appendix A

The return filed by appellant for Jonathan Vickers, noted Metropolitan tenor, for the period from February 20 to June 15, 1965, showed gross income of $32,525 from the Metropolitan Opera Company with total expenses of $13,638.75 consisting principally of a commission figured at 30 per cent of gross income and a publicity charge of $2876.60. Vickers testified that he had never seen the return and had not signed it, that his commissions were 10 per cent of his gross income, and that he had no publicity expenses whatsoever during the period.

The government also introduced the testimony of Margot Fonteyn, Joseph Witt, Adriano Petronio, Renata Tebaldi, Dandor Konya, and Raina Kabaiwanska to show that their returns claimed deductions for expenses which they had never incurred.

The appellant testified in his own behalf at the trial, admitting that he had made some payments to Fontana, Gordon and Pacello, but claiming that it was necessary to do so in order to prevent delay and interference in the processing of his clients' returns. He maintained that all information supporting deductions came directly from the taxpayers.

Appellant raises many points as grounds for reversal, but only a few of them merit discussion.

Appellant argues that the court erred in submitting the twenty-seven bribery counts to the jury with the alternative gratuity counts on the theory that this joint submission suggested to the jury that the defendant was guilty either of bribery or of paying unlawful gratuities. We do not agree. The evidence was uncontradicted that appellant made repeated payments to the three tax tech-

nicians who reviewed his returns. Only the purpose of these payments was at issue. While the jury acquitted the appellant on the bribery counts, the evidence was clearly sufficient to warrant their submission to the jury. Any possibility that the jury might have concluded from the submission of both the bribery and gratuity counts that appellant must have been guilty of one or the other was removed by the trial judge's charge. The charge carefully distinguished between the two offenses and instructed the jury that the "defendant can be acquitted of both or found guilty on one or the other . . . ."

Appellant next argues that the court erred in allowing the admission of a number of tax returns for a period prior to the period referred to in the indictment. In light of appellant's defense that he made payments to the tax technicians only under duress and that he did not know that the returns contained false information, the fraudulent tax returns were clearly admissible to show motive and criminal intent. *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States* v. *Deaton*, 381 F.2d 114, 117-18 (2d Cir. 1967). The fact that appellant had long been filing fraudulent tax returns on behalf of his clients was highly probative of his motive in paying off the agents who were charged with the duty of scrutinizing those returns. We note also that the court in the charge carefully limited the purpose for which the jury was to consider this evidence.

Appellant contends that the trial court unfairly restricted his cross-examination of Fontana, Gordon, and Pacello, the tax technicians, as to their motives for testifying. The record, however, shows that the appellant had an extensive opportunity to cross-examine on these mat-

ters. There are ninety pages of cross-examination of Fontana, over one hundred pages for Gordon, and forty-five pages for Pacello. Both Gordon and Pacello were questioned concerning their possible motives to testify falsely in exchange for favorable treatment from the government. Appellant was limited only when he continued to press repetitious questions.

Appellant claims that there was insufficient evidence to sustain a conviction on the charge of falsely stating on Sixten Ehrling's return of April 17, 1965 that Ehrling did not intend to return to the United States. The government proved that appellant had examined Ehrling's file at Columbia Artists Management, Inc., and that this file contained several contracts obligating Ehrling to return to the United States before the end of 1965. The court correctly charged that in order to convict under 18 U.S.C. §1001 (1964) the jury need only find that the defendant acted "with reckless disregard of whether the statement . . . was true" or that appellant "acted with a conscious purpose to avoid learning the truth." *See United States* v. *Abrams*, 427 F.2d 86, 91 (2d Cir. 1970).

Appellant contends that the court's comments concerning 18 U.S.C. §2 (1964), the aiding-and-abetting section, in its charge to the jury on Section 1001 counts, confused the jury. The record shows that when appellant excepted to the charge, the court recharged on the subject, stating explicitly that the jury could not convict appellant on an aiding-and-abetting theory but only as the principal. The appellant thereupon expressed his complete satisfaction with the charge on this point. At no time during the trial was any evidence presented on an aiding-or-abetting theory, the theory at all times being that none of the tax-

payers knew of appellant's fraud. The corrected charge was adequate to withdraw the inapplicable aiding-and-abetting section from the jury's consideration.

Appellant's other claims are without merit and do not require discussion.

Affirmed.

APPENDIX B

Judgment and Commitment

(Filed—July 30, 1970)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

NORMAN H. EGENBERG,

No. 70 CR 23

On this 30th day of July, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully & knowingly giving, offering & promising things of value to Tax Technicians of the Internal Revenue Service, United States Treasury Department, for & because of official acts performed & to be performed by such public officials in connection with tax examinations of departing aliens, (Title 18, United States Code, Sections 201(f) and 2); unlawfully, wilfully & knowingly making false, fictitious & fraudulent statements & representations on U.S. Departing

Appendix B

Alien Income Tax Returns, knowing same to be false, fictitious & fraudulent, (Title 18, United States Code, Secs. 1001 & 2); unlawfully, wilfully & knowingly aiding & assisting in, procuring, counseling & advising the preparation & presentation to the District Director of Internal Revenue of U.S. Departing Alient Income Tax Returns which were fraudulent and false as to material matters. (Title 26, United States Code, Section 7206(2) & Title 18, United States Code, Section 2.) as charged in cts. 30, 31, 32, 34, 35, 37 thru 47, 49, 50, 51, 53, 54, 56, 62, 77 & 81 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) YEARS and FINED $100.00 on each of counts 30, 31, 32, 34, 35, 37 thru 47 inclusive, 49, 50, 51, 53, 54 and 56. FIVE (5) YEARS and FINED $10,000.00 on count 62. THREE (3) YEARS and FINED $2,000.00 on counts 77 and 81. The prison sentences imposed on each counts 30, 31, 32, 34, 35, 37 thru 47 inclusive, 49, 50, 51, 53, 54, 56, 62, 77 and 81 are to run CONCURRENTLY with each other. The fines totalling $2,200.00 on counts 30, 31, 32, 34, 35, 37 thru 47 inclusive, 49, 50, 51, 53, 54 & 56, the fine of $10,000.00 on count 62 and the fines totalling $4,000.00 on counts 77 & 81 are to be paid or the defendant is to stand committed until the total fines are paid or he is otherwise discharged according to law.

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The defendant is continued on his present bail to post bail pending appeal fixed in the sum of $3,500.00 and upon the conditon he files his appeal in ten (10) days.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDMUND L. PALMIERI
United States District Judge

JOHN LIVINGSTON
Clerk.

APPENDIX C

Indictment

(Filed—January 12, 1970)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

NORMAN H. EGENBERG,

Defendant.

COUNTS ONE THROUGH TWENTY-EIGHT

The Grand Jury charges:

On or about the dates hereinafter set forth, in the Southern District of New York, NORMAN H. EGENBERG, the defendant, unlawfully, wilfuly and knowingly, directly and indirectly, did corruptly give, offer and promise things of value as hereinafter set forth, to public officials of the United States, as hereinafter set forth, who were then and there officers, employees and persons acting for and on behalf of the United States and a department and agency thereof, to wit, Tax Technicians of the Internal Revenue Service, United States Treasury Department, with intent to influence the official acts of such public officials, to influence such public officials to make opportuni-

ties for the commission of frauds on the United States; and to induce such public officials to do or to omit to do acts in violation of their lawful duties in connection with certain tax examinations of departing aliens:

Count	*Approximate Date of Offense*	*Public Official*	*Thing of Value*
1	Jan. 11, 1965	Raphael J. Pacello	Longchamps credit card—charge of $19.33
2	Jan. 27, 1965	Vincent Fontana	$25.00
3	Jan., 1965	Solomon Gordon	$200.00
4	Feb. 3, 1965	Vincent Fontana	$20.00
6	Feb. 17, 1965	Vincent Fontana	$30.00
7	Mar. 11, 1965	Vincent Fontana	$50.00
8	Mar. 12, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $30.05
9	Mar. 12, 1965	Vincent Fontana	$25.00
10	Mar. 17, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $21.05
11	Mar., 1965	Solomon Gordon	$50.00
12	Apr. 9, 1965	Vincent Fontana	$25.00
13	Apr. 16, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $34.30
14	May 29, 1965	Solomon Gordon	$50.00
15	May 31, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $19.95
16	May or June, 1965	Solomon Gordon	$100.00

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Count	*Approximate Date of Offense*	*Public Official*	*Thing of Value*
17	June 2, 1965	Vincent Fontana	$100.00
18	June 4, 1965	Raphael J. Pacello	Diner's Club credit card-charge of $41.05
19	June 23, 1965	Vincent Fontana	$40.00
20	June 28, 1965	Vincent Fontana	Pen
21	July 3, 1965	Raphael J. Pacello	Diner's Club credit card-charge of $34.90
22	Aug. 1, 1965	Raphael J. Pacello	Diner's Club credit card-charge of $29.15
23	August or Sept., 1965	Solomon Gordon	$25.00
24	Nov. 16, 1965	Vincent Fontana	Pen & Pencil Set
25	Nov. 1965	Solomon Gordon	$25.00
26	Dec. 1, 1965	Raphael J. Pacello	$25.00
27	Dec. 1965	Solomon Gordon	$200.00
28	Jan. 4, 1966	Vincent Fontana	$100.00

Title 18, United States Code, Sections 201(b) and 2)

COUNTS TWENTY-NINE THROUGH FIFTY-SIX

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Norman H. Egenberg, the defendant, unlawfully, wilfully and knowingly directly and indirectly did give, offer and promise things of value as hereinafter set forth, otherwise than as provided by law for the proper discharge of official duty, to public officials of the United States, as hereinafter set forth who

were officers, employees and persons acting for and on behalf of the United States and department and agency thereof, to wit, Tax Technicians of the Internal Revenue Service, United States Treasury Department, for and because of official acts performed and to be performed by such public officials in connection with tax examinations of departing aliens:

Count	*Approximate Date of Offense*	*Public Official*	*Thing of Value*
29	Jan. 11, 1965	Raphael J. Pacello	Longchamps credit card—charge of $19.33
30	Jan. 27, 1965	Vincent Fontana	$25.00
31	Jan., 1965	Solomon Gordon	$200.00
32	Feb. 3, 1965	Vincent Fontana	$20.00
34	Feb. 17, 1965	Vincent Fontana	$30.00
35	Mar. 11, 1965	Vincent Fontana	$50.00
36	Mar. 12, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $30.05
37	Mar. 12, 1965	Vincent Fontana	$25.00
38	Mar. 17, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $21.05
39	Mar., 1965	Solomon Gordon	$50.00
40	Apr. 9, 1965	Vincent Fontana	$25.00
41	Apr. 16, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $34.30
42	May 29, 1965	Solomon Gordon	$50
43	May 31, 1965	Raphael J. Pacello	Diner's Club credit card—charge of $19.95

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Count	*Approximate Date of Offense*	*Public Official*	*Thing of Value*
44	May or June, 1965	Solomon Gordon	$100
45	June 2, 1965	Vincent Fontana	$100.00
46	June 4, 1965	Raphael J. Pacello	Diner's Club credit car charge of $41.05
47	June 23, 1965	Vincent Fontana	$40.00
48	June 28, 1965	Vincent Fontana	Pen
49	July 3, 1965	Raphael J. Pacello	Diner's Club credit car charge of $34.90
50	Aug. 1, 1965	Raphael J. Pacello	Diner's Club credit car charge of $29.1
51	Aug. or Sept., 1965	Solomon Gordon	$25.00
52	Nov. 16, 1965	Vincent Fontana	Pen & Pencil Set
54	Dec. 1, 1965	Raphael J. Pacello	$25.00
53	Nov., 1965	Solomon Gordon	$25.00
55	Dec., 1965	Solomon Gordon	$200.00
56	Jan. 4, 1966	Vincent Fontana	$100.00

(Title 18, United States Code, Sections 201(f) and 2.)

COUNTS FIFTY-SEVEN THROUGH SEVENTY-ONE

The Grand Jury further charges:

On or about the dates, hereinafter set forth in the Southern District of New York, Norman H. Egenberg, the defendant, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Inter-

nal Revenue Service, United States Treasury Department, unlawfully, wilfully and knowingly did make and cause to be made false, fictitious and fraudulent statements and representations on U.S. Departing Alien Income Tax Returns (Form 1040(c), United States Treasury Department, Internal Revenue Service) of certain taxpayers, as hereinafter set forth, to wit, that it was the intention of such taxpayers not to return to the United States, whereas in truth and in fact, as the defendant well knew, it was the then present intention of said following taxpayers to return to the United States:

Count	*Date*	*Taxpayer*
57	Jan. 31, 1965	Gabriel Bacquier
58	Feb. 3, 1965	Ingrid Bjoner
59	Feb. 20, 1965	Paul Kletzki
60	Feb. 27, 1965	Biserka Cvejic
61	Mar. 24, 1965	Christa Ludwig
62	Apr. 17, 1965	Sixten Ehrling
63	May 2, 1965	Ernst Haefliger
64	May 30, 1965	Ernst Wiemann
65	May 31, 1965	Franco Corelli
66	June 4, 1965	Sandor Konya
67	June 15, 1965	Jon Vickers
68	June 25, 1965	Renata Tebaldi
69	July 3, 1965	Sandor Konya
70	Dec. 1, 1965	Raina Kabawanska
71	Dec. 23, 1965	Monseratt Caballe

(Title 18, United States Code, Sections 1001 and 2.)

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Count Seventy-Two

The Grand Jury further charges:

On or about the 25th day of April, 1965, in the Southern District of New York, Norman H. Egenberg, the defendant, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Internal Revenue Service, United States Treasury Department, unlawfully, wilfully and knowingly did make and cause to be made false, fictitious and fraudulent statements and representations on U.S. Departing Alien Income Tax Returns (Form 1040(c), United States Treasury Department, Internal Revenue Service) of members of the touring company of Ballet Folklorico De Mexico, to wit, that the total United States source gross income of said ballet company and its said members during the taxable period January 1, 1965 through April 25, 1965 was $130,717.50, whereas in truth and in fact, as the defendant well knew, said total gross income was $277,399.72.

(Title 18, United States Code, Sections 1001 and 2.)

Counts Seventy-Three Through Eighty-Four

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Norman H. Egenberg, the defendant, unlawfuly, wilfully and knowingly did aid and assist in, procure, counsel and advise the preparation and presentation to the District Director of Internal Revenue for the Manhattan District of New York, under, and in connection with matters arising under the Internal

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Revenue laws, to wit, Title 26, United States Code, of returns, statements and other documents to wit, U.S. Departing Alien Income Tax Returns (Form 1040(c), United States Treasury Department Internal Revenue Service) for the taxpayers as hereinafter set forth, which were fraudulent and false as to material matters, in that they represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim certain deductions for items hereinafter set forth in the amounts hereinafter set forth, whereas in truth and in fact, as the defendant well knew, the said taxpayers were not entitled to claim such deductions:

Count	*Date*	*Taxpayer*	*Deduction Items*	*Amount*
73	Jan. 31, 1965	Gabriel Bacquier	Professional Training and coaching	$ 1,000.00
			Publicity and Promotion	$ 649.69
			Secretary, Interpreter	$ 100.00
			Commissions	$ 1,800.00
74	Feb. 3, 1965	Ingrid Bjoner	Claque	$ 50.00
			Secretary,	$ 100.00
			Interpreter Commissions	$ 1,320.00
75	Feb. 20, 1965	Paul Kletzki	Accompanist	$ 450.00
			Studio Rental	$ 275.00
			Commissions	$ 1,447.50

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76	Feb. 27, 1965	Biserka Cvejic	Studio Rental	$ 125.00
			Claque	$ 100.00
			Commisions	$ 1,447.50
77	Apr. 17, 1965	Sixten Ehrling	Accompanist	$ 350.00
			Studio Rental	$ 250.00
			Secretary, Interpreter	$ 575.00
			Commissions	$ 4,371.00
78	May 30, 1965	Ernst Weimann	Travel, Europe, United States and Return	$ 2,172.00
			Commissions	$ 4,567.50
79	May 31, 1965	Franco Corelli	Commissions	$22,573.50
80	June 4, 1965	Sandor Konya	Claque	$ 1,250.00
			Secretary, Interpreter	$ 2,050.00
			publicity and promotion	$ 4,459.29
			commissions	$13,050.00
81	June 15, 1965	Jon Vickers	Commissions	$ 9,757.50
			Publicity	$ 1,896.00
82	June 25, 1965	Renata Tebaldi	Theatrical Equipment	$ 1,844.89
			Claque	$ 2,200.00
			Professional Training, Coaching	$ 2,200.00
			Commissions	$17,671.50

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Count	*Date*	*Taxpayer*	*Deduction Items*	*Amount*
83	Dec. 1, 1965	Raina Kabawanska	Secretary,	$ 350.00
			Interpreter Theatrical	$ 225.00
			Equipment Commissions	$ 3,000.00
84	Dec. 23, 1965	Monserrat Caballe	Accompanist	$ 131.25
			Publicity	$ 2,011.38
			Commissions Promotion	$ 4,000.00

(Title 26, United States Code, Section 7206(2) and Title 18, United States Code, Section 2.)

COUNTS EIGHTY-FIVE THROUGH EIGHTY-EIGHT

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Norman H. Egenberg, the defendant, unlawfully, wilfully and knowingly did aid and assist in, procure, counsel and advise the preparation and presentation to the District Director of Internal Revenue for the Manhattan District of New York, under and in connection with matters arising under the Internal Revenue laws, to wit, Title 26, United States Code, of returns, statements and other documents, to wit, United States Departing Alien Income Tax Returns (Form 1040 (c), United States Treasury Department, Internal Revenue Service) for taxpayers, as hereinafter set forth, which were fraudulent and false as to material matters, in that they represented that such taxpayers had received

income during the taxable period as hereinafter set forth in the amounts hereinafter set forth, whereas in truth and in fact, as the defendant well knew, such taxpayers had received income in excess of such amounts:

Count	*Date*	*Taxpayer*	*Taxable Period*	*Amount*
85	Mar. 24, 1965	Christa Ludwig	January 1, 1965 to March 24, 1965	$ 7,258.14
86	May 2, 1965	Ernst Haefliger	January 1, 1965 to May 2, 1965	$ 3,000.00
87	Apr. 25, 1965	Ballet Folklorico De Mexico—members of touring company	January 1, 1965 to April 25, 1965	$130,717.50 (total for all returns)
88	Dec. 23, 1965	Monserrat Caballe	January 1, 1965 to December 23, 1965	$ 13,200.00

(Title 26, United States Code, Sections 7206(2) and 2, and Title 18, United States Code, Section 2.)

.....

Foreman

ROBERT M. MORGENTHAU
United States Attorney

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-115

NORMAN H. EGENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 441 F. 2d 441.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1971. A petition for rehearing was denied on May 24, 1971. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 23, 1971, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, in charging the jury, wrongly instructed it as to the standard of willfulness under 18 U.S.C. 1001, improperly omitted to instruct that it might consider a defense of economic coercion with respect to the gratuity counts, and wrongly withdrew the aiding and abetting charge as to count 62.

2. Whether petitioner was properly charged with a felony (18 U.S.C. 1001) rather than a misdemeanor (26 U.S.C. 7207) for making false statements on certain tax returns.

3. Whether the order to submit handwriting exemplars to the grand jury violated petitioner's Fourth Amendment rights.

STATEMENT

After a jury trial on an eighty-eight count indictment in the United States District Court for the Southern District of New York, petitioner was convicted on twenty-two counts charging unlawful payment of gratuities (18 U.S.C. 201(f)); on count 62, charging petitioner with making false statements on the departing alien income tax return (Form 1040C) of taxpayer Sixten Ehrling filed on April 17, 1965 (18 U.S.C. 1001); and on counts 77 and 81, charging petitioner with listing false deductions on the Form 1040C tax returns of taxpayers Sixten Ehrling and Jonathan Vickers for the year 1965 (26 U.S.C. 7206(2)). Petitioner was sentenced to two years' imprisonment and a $100 fine on each of the twenty-two gratuity counts; five years' imprisonment and a fine of $10,000 on count 62; and three years' imprisonment and a fine of $2,000

on counts 77 and 81. The prison sentences were made to run concurrently. The court of appeals affirmed (Pet. App. 1a-8a).

As explained in detail by the court of appeals (Pet. App. 1a-5a), petitioner, a tax accountant specializing in practice before the Alien Tax Section of the Internal Revenue Service, represented various European artists appearing in this country. As non-resident aliens, these artists were required to file an income tax return (Form 1040C) whenever they left the United States on which they were to report all income earned in the United States from the beginning of the calendar year until the date of their departure. Federal taxes were withheld on their United States income at the rate of thirty per cent. If at the time of departure an alien did not intend to return to this country before the end of the year, he was entitled to an immediate refund for any overpayment of taxes. Pursuant to powers of attorney, petitioner filed a Form 1040C on behalf of each of his clients and at the end of each tax year he prepared and filed their year-end returns, frequently without consulting them (Tr. 522-525, 527-532).

In most cases, when petitioner would file the tax form for the departing aliens, he would include a form list of deductions, including commissions, coaching, publicity, voice training and other typical expense items. Although in the early 1960's petitioner seldom substantiated the claimed deductions—which were often grossly inflated —the returns were generally accepted with only minor changes. In return for this favorable treatment, petitioner periodically paid substantial

sums of money to Vincent Fontana, Solomon Gordon and Raphael Pacello, the three Internal Revenue Service Alien Tax Section technicians responsible for examining the bulk of the returns which he submitted (Tr. 520-532, 921, 1156-1159). Early in 1964, the review system was changed and the tax technicians were required to submit approximately ten per cent of their returns for immediate review by supervisory personnel. Petitioner adapted to this change by submitting substantiating documents with the returns, many of which were either altered or forged (Tr. 532, 881-883, 1165-1170).

In late 1964, Vincent Fontana confessed to the Internal Revenue Service that he had participated in widespread corruption in the Alien Tax Section. By an arrangement with the Internal Revenue Service Inspection Service, Fontana retained his position in order to report in a daily log any evidence of graft in the section and to turn over to the Inspection Service any unlawful payments which he might receive. Fontana kept his log from January 1965 until January 19, 1966, when petitioner and tax technicians Solomon Gordon and Raphael Pacello were arrested (Tr. 1165-1170). According to the log, petitioner made ten cash payments totalling $440 and gave several gifts to Fontana. During the same period, Fontana examined at least thirty tax returns prepared and filed by petitioner on behalf of non-resident aliens. Fontana testified that, with respect to all the returns which contained deduction schedules, he granted petitioner favorable

treatment by accepting deductions which he knew were excessive and frequently unsubstantiated (Tr. 1171-1238, 1296).

During 1965, petitioner also made six or seven payments to tax technician Solomon Gordon,[1] totalling $500 to $600. Gordon testified that petitioner had given him this approximate sum annually since 1960 or 1961 in exchange for favorable treatment. Gordon believed that petitioner would have continued to pay him the same amounts at fairly regular intervals had the payments not been uncovered by the Inspection Service (Tr. 885-906, 913-923, 997).

Among the returns prepared by petitioner was the 1040C return of Metropolitan Opera tenor Jonathan Vickers, filed by petitioner on June 15, 1965. The return reported gross income from February 20 to June 15, 1965, of $32,525, all from the Metropolitan Opera Company, and listed total expenses of $13,638.75, including commissions of $9,757.50 (thirty per cent of gross income) and a publicity item of $2,876.60. Vickers testified that he had never seen the return before it was filed, nor had he signed it. He stated that his agent's commissions were ten per cent of his gross income, a figure which was corroborated by testimony of his American agent, William Stein. Vickers further stated that his only publicity expenses were incurred on his

---

[1] Prior to testifying in the Egenberg trial, Gordon pleaded guilty to a seven-count information charging him with receiving unlawful gratuities in violation of 18 U.S.C. 201(g) and 2. He was sentenced to a term of imprisonment of nine months and fined $10,000.

behalf by Stein, who testified that during the period in question there had been no such expenses. Furthermore, neither Vickers nor Stein ever told petitioner that Vickers had any publicity expenses or that his commissions were thirty per cent of gross income (Tr. 243-244, 247-248, 253-262, 290-294, 907-909).

While petitioner was making periodic cash payments to Fontana and Gordon for their favorable treatment of alien returns, he allowed tax technician Raphael Pacello [2] the use of various credit cards to charge substantial expenses. During 1965, Pacello examined the 1040C form of Sixten Ehrling, the musical director of the Detroit Symphony Orchestra. Pacello stated that in consideration for the use of petitioner's credit cards he treated the returns filed by petition favorably and usually followed petitioner's instructions, even in disallowing claims. Over half of the returns filed by petitioner and examined by Pacello in 1964 and 1965 showed net losses for the taxpayers (Tr. 1049-1079, 1131).

Sixten Ehrling's 1040C return, filed by petitioner and examined by Pacello, indicated that Ehrling's gross income from January 1 to April 15, 1965, was $14,492.08, with expenses totalling $13,081.22, which resulted in a refund of $1,376.66. Ehrling testified that his agent's commissions actually totalled only twenty

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[2] Prior to testifying at trial, Pacello pleaded guilty to an eight-count information charging him with receiving unlawful gratuities from petitioner in violation of 18 U.S.C. 201(g) and 2. He was sentenced to a term of imprisonment of four months and a fine of $7000.

per cent of his gross income as opposed to the thirty per cent figure reported by petitioner. He further stated that whatever publicity expenses he had incurred for the period were reflected in Columbia Artists' statements—which showed payments of only $10.61, compared to the $1,575 reported by petitioner. Ehrling added that he had incurred no expenses for a secretary-interpreter or accompanist, although his Form 1040C—which he never saw before filing—claimed deductions of $575 and $340 for those expenses (Tr. 602-613, 640-641, 1377-1382). Finally, petitioner indicated on the return that Ehrling did not intend, as of April 15, to return to the United States before the end of the year. In fact, Ehrling was contractually obligated to conduct the Detroit Symphony Orchestra at special appearances during the summer and its regular season in the fall (Tr. 598-602, 613-615). The government introduced handwriting evidence to show that petitioner had reviewed Ehrling's file at Columbia Artists which contained all of Ehrling's contracts (Tr. 1613-1624).

Petitioner admitted making cash payments to Fontana and Gordon and allowing Pacello to use his credit cards, but claimed that the sole purpose of the transactions was to prevent the internal revenue technicians from delaying and interfering with the processing of the tax returns of his clients (Tr. 1426-1431, 1683-1693). Petitioner testified that he nearly always asked artists personally at the time of their departure whether they intended to return to the United States

and prepared their tax forms on the basis of their replies. As for Sixten Ehrling, petitioner claimed that a secretary at Columbia Artists had told him that Ehrling had no plans to return (Tr. 1452-1456, 1962).

ARGUMENT

1. Petitioner contends (Pet. 11-13) that the trial judge erred in instructing the jury with respect to the false statement counts under 18 U.S.C. 1001 that petitioner could be found to have acted with the requisite knowledge and willfulness if the jury concluded beyond a reasonable doubt that he had acted "with reckless disregard of whether the statement * * * was true" or "with a conscious purpose to avoid learning the truth" (Tr. 1957). The decision below, upholding the charge (Pet. App. 7a), however, is consistent with earlier decisions of the Second Circuit (see *United States* v. *Abrams,* 427 F. 2d 86, 91 (C.A. 2), certiorari denied, 400 U.S. 832, and cases cited therein) and, in our view, is correct. It is reasonable to infer that Congress, in enacting 18 U.S.C. 1001, did not intend to differentiate between a person who makes a statement after having ascertained that the statement was false and a person who makes a statement with reckless disregard of the facts or a conscious purpose to avoid learning the truth. In neither case are the statements made in good faith.

Petitioner attempts to establish a conflict on the above point between the decision below and decisions of this Court and other courts of appeals. The cases

relied upon (Pet. 12), however, contain no discussion of whether willfulness includes the concept of acting with reckless disregard of the facts. Petitioner's reliance on *Jacobs* v. *United States*, 359 F. 2d 960 (C.A. 8), for example, for the proposition that carelessness or lack of wisdom is not equivalent to the knowledge of falsity required by a statute similar to 18 U.S.C. 1001 (see 359 F. 2d at 966) is of little avail to him here since the *Jacobs* court earlier in its opinion held merely that the requirement of knowledge was not met if the defendant there "reasonably believed"—which the court found he did—that the statements made by him were valid. 359 F. 2d at 965. The instructions of the trial court here were fully consistent with that holding.

Petitioner contends (Pet. 15-18) that the trial court erred in refusing to charge the jury that the establishment of solicitation by the internal revenue agents and economic pressure on petitioner to make the requested payments would constitute a defense to the gratuity counts under 18 U.S.C. 201(f). This issue was not raised in the court of appeals and should not be considered here. The trial court's charge that to convict on the gratuity counts—in contrast to the bribery counts—"there need not be proof * * * that there was any intent by the defendant to influence an official act of the public official" (Tr. 1945) was correct and recognized the essential distinction between a gratuity charge and a bribery charge. Whether or not the kind of "economic coercion" to which petitioner claims to have been subject is properly relevant to a defense

against a charge of bribery, it is not relevant to a charge of giving gratuities to a public official which does not require a specific intent. See *United States* v. *Barash,* 412 F.2d 26, 29-30 (C.A. 2), certiorari denied, 396 U.S. 832.

Petitioner also contends (Pet. 13-14) that prejudicial error occurred when the trial court withdrew from the jury the aiding and abetting charges against petitioner in connection with the counts alleging violation of 18 U.S.C. 1001, including count 62 on which he was convicted. As to each of the false statement counts, the indictment charged petitioner both as a principal and under 18 U.S.C. 2 as an aider and abetter. The trial judge initially read the aiding and abetting statute to the jury but then commented, as all parties had previously agreed (Tr. 1911-1912), that the section was inapplicable to the facts of the case (Tr. 1955-1956). Petitioner subsequently excepted to the charge as given, and the trial judge agreed to correct it (Tr. 2005-2008). The trial judge then re-charged the jury on the subject, stating explicitly that the jury could not convict petitioner on an aiding and abetting theory but only as a principal (Tr. 2035-2038). At the conclusion of the recharge, the defense expressed satisfaction (Tr. 2038-2039). As at no time during the trial was evidence presented by the government to establish the aiding and abetting charges, the exclusion of the charges from the jury was correct.

2. Petitioner agues (Pet. 18-19) that the charges of falsely stating on certain returns that the taxpayer did

not intend to return to the United States should have been brought under 26 U.S.C. 7207, punishing such conduct as a misdemeanor, rather than under 18 U.S.C. 1001, punishing such conduct as a felony. It is well settled, however, that Section 1001 applies to false statements on tax returns. See, *e.g.*, *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Knox*, 396 U.S. 77. Where, as here, a defendant's conduct violates overlapping statutes, one of which charges a felony and the other a misdemeanor, the choice of which offense to prosecute is a matter within the discretion of the prosecutor. *United States* v. *Beacon Brass Co.*, *supra*, 344 U.S. at 45; see *Sansone* v. *United States*, 380 U.S. 343; *Berra v. United States*, 351 U.S. 131; *Newman* v. *United States*, 382 F.2d 479, 481 (C.A.D.C.); *United States* v. *Eisenmann*, 396 F.2d 565, 567-568 (C.A. 2).

3. Petitioner was ordered by the district judge to produce certain handwriting exemplars to the grand jury at a time when that body had already indicted him but was considering a superseding indictment which ultimately was returned. Petitioner furnished the exemplars. Thereafter at trial, the government on rebuttal called a handwriting expert for the purpose of proving that petitioner had examined Sixten Ehrling's file at Columbia Artists and therefore must have known of Ehrling's contracts and intent to return to the United States before the end of 1965. The government expert testified pursuant to stipulation that the words "copyright fees" appearing in two places in Ehrling's

financial statements contained in the file at Columbia Artists were written in the same hand as known samples of petitioner's handwriting in various tax returns (Tr. 1613-1624).

Petitioner relying on *In re Dionisio,* 442 F.2d 276 (C.A. 7), government petition for a writ of certiorari pending, No. 71-229, contends (Pet. 14-15) that the order compelling him to produce handwriting exemplars before the grand jury constituted a violation of his Fourth Amendment rights.[3] The handwriting exemplars produced before the grand jury, however, were not relied upon by the handwriting expert at trial, whose testimony was based solely on the known samples of petitioner's writing appearing in various tax returns. As the latter samples were readily available to the government irrespective of the exemplars produced before the grand jury, the expert's testimony was properly admitted even if—which we deny—petitioner's Fourth Amendment rights were infringed before the grand jury. In any event, the decision in *Dionisio* (which involved voice exemplars) was based on factors not involved here—the absence of a prior determination of probable cause and the alleged "dragnet" nature of the subpoenas, issued to more than twenty persons.

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[3] Petitioner also cites *Hill* v. *Philpott*, C.A. 7, decided May 17, 1971, 9 Cr.L. 2239. That case, however, dealt with whether certain tax records could be seized under the Fifth Amendment privilege against self-incrimination, and has no bearing on the issue here sought to be raised.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-115

NORMAN H. EGENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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UNITED STATES OF AMERICA,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

In answer to petitioner's contention that the Government converted a false statement charge which should have been brought under the misdemeanor section (Title 26, U.S.C. §7207) rather than the felony section (Title 18, U.S.C. §1001), respondent argues:

> "It is well settled, however, that Section 1001 applies to false statements on tax returns. See, *e.g.*, *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Knox*, 396 U.S. 77."

and further:

> "Where, as here, a defendant's conduct violates overlapping statutes, one of which charges a felony and the other a misdemeanor, the choice of which offense to prosecute is a matter within the discretion of the prosecutor. *United States* v. *Beacon Brass Co., supra,* 344 U.S. at 45; see *Sansone* v. *United States,* 380 U.S. 343; *Berra* v. *United States,* 351 U.S. 131; [and two other lower court decisions]."

Section 7207, Title 26, U.S.C. was enacted in the 1954 Internal Revenue Code some two years before this Court's opinion in *United States* v. *Beacon Brass Co., supra. Sansone* v. *United States,* 380 U.S. 343 (1965). In addition, in *United States* v. *Beacon Brass Co.,* the issue was not whether Section 35(A) of Title 80, U.S.C., the predecessor of Section 1001, Title 18, U.S.C., applied to income tax returns; it was rather whether a false statement with respect to an income tax return could be considered a further attempt to evade taxes under Section 145(b), Title 26, U.S.C. In passing upon this question, this Court said:

> "We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." 344 U.S. at 45.

In *United States* v. *Knox,* also cited by respondent in support of its statement that Section 1001 applies to false statements on tax returns, the issue as to the propriety

of charging the offense under Section 1001 was not even raised. Neither of these opinions of this Court, therefore, supports respondent's contention that Section 1001, Title 18, U.S.C., may properly be invoked for a false statement on a tax return after Congress enacted Section 7207, Title 26, U.S.C., in 1954. There thus remains the issue whether after the amendment to the Internal Revenue Code in 1954 when Section 7207 was first enacted Congress intended that any false statement relating to a tax return should be confined to Section 7207. This should be considered in the light of the failure of Congress to provide in Section 7207 that the penalty there provided was "in addition to other penalties provided by law," a fact noted with some consideration in this Court's opinion in *United States* v. *Beacon Brass Co.*, 344 U.S. *supra* at 46.

Respondent concludes that where a defendant's conduct violates overlapping statutes, it is up to the prosecutor in his own discretion to determine whether to proceed under the felony or the misdemeanor. In this connection, respondent cites this Court's opinions in *United States* v. *Beacon Brass Co., Sansone* v. *United States,* and *Berra* v. *United States,* as well as two lower court opinions. It is respectfully submitted that none of the opinions of this Court supports such a statement by respondent. *United States* v. *Beacon Brass Co.* does not; neither does this Court's opinion in *Sansone* v. *United States.* Indeed, in *Berra* v. *United States,* this Court limited its decision as follows:

> "The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction." 351 U.S. at 135

Respondent cannot brush by the facts here and dispose of the issue on a theory of prosecutorial discretion under overlapping statutes. This Court has indicated in *United States* v. *Beacon Brass Co.* that:

> "At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." 344 U.S. *supra* at 45.

Facts necessary to prove a violation of Section 7207, Title 26, U.S.C., are identical, it is respectfully submitted, to that necessary to constitute a violation of Section 1001, Title 18, U.S.C. In other words, proof to convict under Section 7207 is sufficient to convict under Section 1001, Title 26, U.S.C.

In a comparable situation, a defendant argued in *United States* v. *Coppola,* 425 F.2d 660 (2d Cir. 1969), that Section 7201, Title 26, U.S.C., relating to a wilful evasion of taxes was unconstitutional where on the facts charged he was guilty of the misdemeanor under Sections 7203 and 7207 of Title 26, U.S.C. The Circuit Court noted that "in order to state a claim of constitutional dimensions, Coppola must establish the converse, that a violation of either misdemeanor section would invariably constitute a violation of the felony provision." 425 F.2d *supra* at 661. Petitioner submits that is exactly what has been done here notwithstanding respondent's contentions to the contrary.

It is respectfully submited that a grant of certiorari is warranted to prohibit the unlawful, improper, arbitrary, and unfettered discretion of a prosecutor to convert an offense which Congress specifically described in Section 7207, Title 26, U.S.C., as a misdemeanor, sub-

ject to a maximum penalty of one year imprisonment, to a felony under Section 1001, Title 18, U.S.C., subject to a maximum penalty of five years imprisonment.

Respectfully submitted,

LOUIS BENDER,
Attorney for Petitiioner.

October 14, 1971

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No. 71-175

In the Supreme Court of the United States

OCTOBER TERM, 1971

NORMAN H. EGENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This supplemental memorandum is submitted in response to a letter from the Clerk of this Court dated October 20, 1971, requesting the government to file a further brief "directed specifically to the arguments, advanced in the petitioner's reply brief, that the cases cited in your earlier response should not be held to control the question whether 26 U.S.C. 7207 precludes the application of 18 U.S.C. 1001 to the acts charged to petitioner."

The cases cited in our earlier memorandum on this issue—principally *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Eisenmann*, 396 F. 2d 565, 567-568 (C.A. 2); and *Sansone* v. *United States*, 380 U.S.

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343—were not intended to be controlling but merely to show that repeals of statutes by implication are not favored. As applied to 18 U.S.C. 1001, further research has confirmed that the courts have repeatedly rejected claims that the existence of more specific statutes punishing false statements, which partially overlap that Section, have the effect of pro tanto repealing Section 1001 or preventing prosecution thereunder. See, *e.g.*, *United States* v. *Gilliland*, 312 U.S. 86;[1] *Cohen* v. *United States*, 201 F. 2d 386, 392–393 (C.A. 9), certiorari denied, 345 U.S. 951.[2]

Prior to the enactment of Section 7207 in 1954, the courts had held that neither the predecessor to that statute (Section 3616 of the Internal Revenue Code of 1939) nor a related section of the Code repealed or barred prosecution pro tanto under 18 U.S.C. 1001. See *Ex parte Cohen*, 191 F. 2d 300 (C.A. 9) (denying bail), concurred in at 192 F. 2d 933, certiorari denied, 342 U.S. 947; *Gaunt* v. *United States*, 184 F. 2d 284, 286–287, 289–290 (C.A. 1), certiorari denied, 340 U.S. 917. The legislative history of Section 7207 reveals that Congress in 1954 did not intend any basic changes in the coverage of the Section (see H. Rep. No. 1337 and S. Rep. No. 1622, 83d Cong., 2d Sess., set forth in

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[1] In *Gilliland* the Court rejected a contention that enactment of the Hot Oil Act of 1935, one year following the enactment of the predecessor of Section 1001, meant that Congress intended that prosecutions for false statements made in affidavits submitted under the Hot Oil Act be brought only under the more lenient provisions of that Act punishing such false statements.

[2] In *Cohen*, as in the *Eisenmann* case, *supra*, the court of appeals held that Section 1001 could apply notwithstanding the existence of a more specific false statement statute in the internal revenue field.

1954 U.S. Code Cong. & Adm. News, pp. 4573, 5253), although this Court in *Sansone* v. *United States,* 380 U.S. 343, 347–349, held that it was only in the 1954 reenactment that Congress first intended Section 7207 to extend to false statements on income tax returns.[3] Subsequent to 1954 only one district court to our knowledge has passed on the precise issue here raised, that court holding that prosecutions under Section 1001 were not affected by the passage of Section 7207. *United States* v. *Citron,* 221 F. Supp. 454 (S.D. N.Y.).

We think this result is proper and reflects the long line of decisions set forth above in which this Court and others have resisted efforts to curtail the scope of 18 U.S.C. 1001 based upon the existence of other, more specific false statement statutes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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[3] The Court in *Achilli* v. *United States,* 353 U.S. 373, had held that the predecessor statute, Section 3616(a), did not apply to income tax returns.

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